No. 44800-9-II

IN THE COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

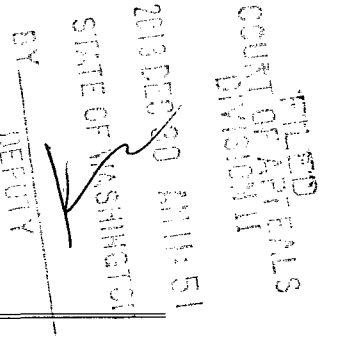
BRIAN BESAW, et ux,

Appellants,

v.

PIERCE COUNTY, et al.,

Respondents.



APPELLANTS' OPENING BRIEF

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TABLE OF CONTENTS

Introduction.....5

Assignments of Error 7

Issues Relating to Assignments of Error.....7

Statement of Fact.....8

A. Factual Background.....8

B. Procedural History.....10

Argument.....19

A. Pierce County Had A Statutory Duty Of Animal Control.....19

B. Potentially Dangerous Dogs Must Be Tattooed Or Have A Microchip Implanted For Identification.....22

C. Pierce County's Failure to Enforce Its Animal Control Laws Falls Within the "Failure to Enforce" Exception to the Public Duty Doctrine.....25

D. Pierce County Had A Common Law Duty Of Animal Control.....28

E. The Negligence By Pierce County Was A Proximate Cause Of Plaintiff's Injuries.....33

Conclusion.....35

TABLE OF AUTHORITIES

Cases

Atherton Condo. Apartment/Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.
115 Wn.2d 506, 531, 799 P.2d 250 (1990).....26

Bailey v. Town of Forks
108 Wn.2d 262, 268, 737 P.2d 1257 (1987).....26

Balise v. Underwood
62 Wn.2d 195, 199, 381 P.2d 966 (1963)
62 Wn.2d at 200.....19

Champagne v. Spokane Humane Society
47 Wn. App. 887, 894-95, 737 P.2d 1279 (1987)
47 Wn. Ap.. at 896.....5,6,9,18,32,34

Donatelli v. D.R Strong
Wn. 2d 312, P3d 620 (2013).....19

Gorman v. Pierce County
176 Wn. App. 63, 307 P.3d 795 (2013).....5,6,18,25,26,27

King v. Hutson
97 Wn. App. 590, 987 P.2d 655 (1990).....9,18,27,34

Livingston v. City of Everett
50 Wn. App. 655, 751 P.2d 1199 (1988)
review denied, 110 Wn.2d 1028 (1988).....9,26,27,32,34

Mason v. Bitton
85 Wn.2d 321, 326, 354 P.2d 1360 (1975).....6

McLeod v. Grant County School District
42 Wn.2d 316, 255 P.2d 360 (1953).....33

Robb v. City of Seattle
176 Wn.2d 427, 295 P.3d 212 (2013).....25

Pattern Instructions

WPI 15.01.....33

WPI 15.04.....7,33

WPI 15.05.....33

Pierce County Codes

PCC 6.02.010.....6,20,22

PCC 6.02.010(BB).....15

PCC 6.02.020.....20

PCC 6.03.....23

PCC 6.03.020.....23

PCC 6.03.030.....31

PCC 6.03.030(B).....24

PCC 6.030.050.....23

PCC 6.04.010.....23

PCC 6.07.....20

PCC 6.07.010.....20,21,30

PCC 6.07.010(B).....21

PCC 6.07.01(c)(6).....21

PCC 6.07.020.....21,22

PCC 6.07.030.....18,22

PCC 6.07.035.....22

PCC 6.07.040.....22,23,31

PCC 6.070.010.....21

RCW

RCW 16.08.-7-(2).....24

RCW 16.08.080(6).....24

RCW 16.08.090.....30,34

RCW 16.08.090(2).....19

I. INTRODUCTION

This case involves a dog bite allegedly resulting from Pierce County's failure to enforce its animal control ordinances. Unfortunately, the County was dismissed from this matter by way of an order granting Pierce County's motion for summary judgment which was filed on March 22, 2013 (CP 369-70); (RP 3/22/13, Page 25-26). Through the timing of this order dismissing Pierce County from this case, the Trial Court did not have the benefit of this Court's opinion in the case of *Gorman v. Pierce County*, 176 Wn. App. 63, 307 P.3d 795 (2013). In *Gorman*, the majority opinion firmly placed Division II in the camp of the other divisions of the Court of Appeal, which previously recognized that a County's failure to enforce its own animal control ordinances can subject it to liability under the "failure to enforce" exception to what is known as the "Public Duty Doctrine".[1]

As will be discussed in more detail below, under the clear guidance of the *Gorman* opinion, there is simply no question that there are and were questions of fact precluding summary judgment in this case on the issues

[1] An earlier Division III opinion in the case of *Champagne v. Spokane Humane Society*, 47 Wn. App. 887, 894-95, 737 P.2d 1279 (1987) held that a governmental entity's failure to enforce its animal control ordinances and a resulting dog bite the "special relationship" exception to the Public Duty Doctrine. Unfortunately the Trial Court appeared to have focused on this exception when ruling on Pierce County's motion for summary judgment which resulted in dismissal of Pierce County from this case below. (See RP 3/22/13, Page 26). This despite the fact that **both** the "special relationship" and "failure to enforce" exceptions were fully briefed within plaintiff's (appellant herein) response to Pierce County's motion for summary judgment. (CP 117-124).

of whether or not Pierce County's failure to enforce its own animal control ordinances was a concurrent proximate cause of a dog bite suffered by plaintiff on July 5, 2011, which occurred following years of complaints regarding a "pack" of dogs which had been plaguing plaintiff's neighborhood "both before and after this event.[2] As outlined in plaintiff's materials in opposition of Pierce County's motion for summary judgment, plaintiff, (and others), made numerous complaints regarding the pack of pit bulls in their neighborhood inclusive of the pit bull whose bite ultimately forms the basis for this lawsuit.

As will be set forth below, not only did the Trial Court err in determining that there were no material issues of fact with respect to whether or not Pierce County's actions (and failures to act) fell within the "failure to enforce" exception to the Public Duty Doctrine, (as defined within the *Gorman* opinion, but also in its determination that Pierce County's negligence was not "a proximate cause" of plaintiff's injuries. As more fully set forth below, there is, at a minimum, a question of fact in this matter as to whether or not Pierce County's negligence was a concurrent proximate cause of the injury producing event. See *Champagne v. Spokane Humane Society*, 46 Wn. App. at 895, citing to *Mason v. Bitton*, 85 Wn.2d 321, 326, 354 P.2d 1360 (1975) (the

[2] Through the terms of Pierce County's own ordinance, a "pack" is defined as two or more dogs. What is at issue in this case is two **pit bulls.** See P.C.C. § 6.02.010.

negligence of two or more persons may combine to cause an injury") see also WPI 15.04. Given the existence of such material facts, the Trial Judge's order granting summary judgment in favor of Pierce County should be reversed and this matter remanded back to the Trial Court for further proceedings.

II. ASSIGNMENT OF ERROR

1. The Trial Court erred in granting Pierce County's Motion for Summary Judgment due to material issues of fact as to whether or not the county's action and inactions violated the failure to enforce exception to the Public Duty Doctrine.

2. The Trial Court erred by determining as a matter of law that Pierce County's concurrent negligence was not a proximate cause of plaintiff's injuries.

III. ISSUES RELATING TO ASSIGNMENT OF ERROR

1. Did the Trial Court commit error by dismissing plaintiff's negligence claim against Pierce County, when there were clearly material issues of fact, with respect to whether or not under the "failure to enforce" exception to the Public Duty Doctrine, Pierce County was negligent in the enforcement of its animal control ordinances and whether or not such

negligence was a concurrent proximate cause in the dog bite injuries suffered by the plaintiff in this action?

2. Whether, given the existence of material issues of fact regarding the issues of negligence and proximate cause, the Appellate Court will remand this matter for further proceedings before the Trial Court which had erroneously granted summary judgment in favor of Pierce County in this action?

IV. STATEMENT OF FACTS

A. Procedural History

This lawsuit was originally filed on April 26, 2012. (CP 1-6) Named in the complaint not only were the property owners at the location where plaintiff suffered a dog bite injury but also Pierce County. The complaint contained very specific allegations regarding the history the two pit bulls residing at the address where plaintiff suffered his bite. It was also noted in the complaint that it was only subsequent to Plaintiff's bite that efforts were taken by Pierce County through its animal control division to take enforcement actions against the pit bulls who had previously been the subject of numerous complaints. On June 19, 2012, defendant Pierce County filed its answer. (CP 7-12). Within its answer, the defendant admitted a number of the allegations set forth within plaintiff's complaint and also asserted various affirmative defenses

including "failure to state a claim". On February 22, 2013, Pierce County moved for summary judgment. (CP 14-33). Within Pierce County's summary judgment materials, it challenged plaintiff's ability to meet any of the exceptions to the "Public Duty Doctrine" (which will be more fully discussed below. Curiously, within its moving papers, Pierce County failed to cite to the above-referenced *Champagne* case, as well as, two other critical opinions directly genuine to the issue it was attempting to raise before the court. See *Livingston v. City of Everett*, 50 Wn. App. 655, 751 P.2d 1199 (1988), review denied, 110 Wn.2d 1028 (1988); *King v. Hutson*, 97 Wn. App. 590, 987 P.2d 655 (1990). (In both these cases, the Appellate Court had found that governmental entities, such as cities and counties, could be subject to liability for failing to enforce its animal control laws). Also, within its moving papers, Pierce County argued that any actions on its part was not a "proximate cause" of the injuries suffered by the plaintiff. (CP 28-29).

Plaintiff filed a detailed response. (CP 103-309). In that response, plaintiff produced the county's own document sharing, among other things, numerous complaints to the county's animal control department regarding the pit bulls located at the address where the plaintiff suffered his bite injury. Such complaints dated as far back as 2008. (CP 105; CP 158-216).

On March 22, 2012, defendant's filed their motion for summary judgment that was heard before the Honorable Jack Nevin. (RP 3/22/13). Following extensive argument, Judge Nevin, while finding liability on the part of the individual defendant, dismissed Pierce County apparently on the grounds that the county's actions were not a "proximate cause" of the dog bite, and given the absence of "assurances" the County could not be liable. The Trial Court did not separately analyze the "failure to enforce" exception to the Public Duty Doctrine. (Id. at 25-26).

The dismissal of Pierce County did not end the case because claims still existed with respect to the individually named defendants. Thereafter, plaintiff sought and acquired an order granting CR 54(B) certification and steps were taken for entry of a final judgment. (CP 374; 347-432). On June 20, 2013 a default judgment was entered against Kristie Johnson, who was served but failed to appear in the action. In the default judgment, it is specifically noted that Ms. Johnson was the owner of the dog who had bit plaintiff Besaw, and judgment was entered against her for the amount of $42,634.15. (CP 435-436). As a final judgment was entered, the further efforts were made to perfect this appeal.

B. Factual Background

The Pierce County Auditor, a division of Pierce County, ("Pierce County") took over animal control in the county on January 1, 2006. (CP

149-150) Citizens with concerns about dogs would call the Pierce County "PETS" line or 911; both sources of calls are received by Pierce County Animal Control. (CP 150-151; 282)

Pierce County Animal Control Supervisor Brian Boman testified that a "potentially dangerous animal is an animal that inflicts a bite on a human or animal, threatens or approaches a person upon a street, sidewalk or any public or private grounds in an menacing fashion or apparent attitude of attack." (CP 284). According to Boman, once the dog is declared "potentially dangerous" the dog is required to be leashed and muzzled when outside and in a kennel when inside. (CP 284).. Officer Boman was aware of the prior history of the Johnson **pit bulls** would approach people in the neighborhood in a menacing fashion. *Id.* Prior to Besaw's bite, Pierce County Animal Control was aware of at least 13 incidents related to the Johnson **pit bulls** at 1721 118th Street, either owned by Johnson or her roommate Mr. Russo. (CP 244). These reports concern the same dogs, demonstrating that the dogs were a danger to the community, and were required to actually go to the dog's owners house, including:

- August 16, 2008, report of aggressive behavior;
- October 11, 2009, report that dogs were roaming and loose in the neighborhood;

- December 18, 2009, report that the dogs were roaming and loose in the neighborhood;
- January 29, 2010, report that the dogs were demonstrating aggressive behavior in the neighborhood;
- February 16, 2010; CAD Incident Report for the dogs running loose;
- February 15, 2010, report that the dogs were demonstrating aggressive behavior in the neighborhood;
- May 3, 2010, report that the dogs were demonstrating aggressive behavior in the neighborhood;
- June 2, 2010, report that the dogs were demonstrating aggressive behavior in the neighborhood;
- August 2, 2010, report of dogs being loss on the streets;
- September 3, 2010 Loose dog complaint
- September 2, 2010, report that the dogs were demonstrating aggressive behavior in the neighborhood;
- September 12, 2010, report of 2 aggressive **pit bulls;**
- June 24, 2011, report of a bite on a person

(CP 176-177).

On August 16, 2008, a neighborhood citizen was charged by one of the Johnson **pit bulls** while waiting to cross the street; the dog lunged and barked at her. (CP 214). Animal Control officer Clint Davis was put on direct notice of this incident. (CP 268). On October 11, 2009, Animal Control was again put on notice that the two Johnson **pit bulls** were roaming the neighborhood. (CP 212). On December 18, 2009, Animal Control was put on notice that the two **pit bulls** in question "run all over the neighborhood" and were not contained in any way, as reported by Besaw (CP 210). On January 29, 2010, the Johnson **pit bulls** were reported roaming the neighborhood attempting to attack Besaw's shiatsu dogs. (CP 208). On February 15, 2010, the Johnson Dog in question was reported attempting to attach the cats owned by neighbor Dennis Russo. (CP 205-206). On May 3, 2010, the dangerous Johnson dogs were again reported to Animal Control to be roaming the neighborhood, with photographs to prove it. (CP 200-203) (CP 291). Animal Control Officer Clint Davidson affirmed that there was adequate evidence to issue an infraction, but failed to do so. (CP 268). Officer Davison admits that there was awareness and a grave concern that the dogs were loose in the neighborhood. (CP 268-269).

On August 2, 2010, the two Johnson dogs were reported to be roaming he neighborhood and Animal Control Officer Jody page was on

notice of this fact but only gave a verbal warning. (CP 198; 275; 291). The Johnson **pit bulls** "would always run together" in the neighborhood. . (CP 241; 248). On September 2, 2010, Carmen Besaw reported aggressive behavior by the two Johnson **pit bulls** and that the dogs continued to come into her yard to attack her small dogs. (CP 196; 291-292). Ms. Besaw reported the Animal Control that these issues "just keep happening" and Officer Jody Page was aware of these claims, but still only gave a verbal warning. (CP 196; 275). The Johnsons promised to keep the dogs tied up, but failed to do so. (CP 196). Edwin Tinitali reported that his daughter Tatiana Ofoaia was bitten by the dog in question on June 24, 2011. (CP 194). Tinitali also reported that the fence that held the dogs was broken. (CP 194). Pierce County asserts that the person bitten did not want to report the bite, but Animal Control Officer Jody Page testified that she did not attempt to personally talk to this victim. (CP 275-276).

About two weeks later, on July 6, 2011, the dog in question had bit the plaintiff. (CP 177). Mr. Besaw required medical treatment at St. Clare's Hospital and now has a fear of dogs. (CP 107; 253-254). It was only after this second bite incident on Besaw that Pierce County left an order of quarantine related to the dogs, but Animal Control failed to do quarantine the dogs based on the June 2011 bite incident-which would have prevented the Besaw bite. (CP 269). Animal control did not begin

the PDA (potentially dangerous animal) paperwork for both dogs until late July 2011, well after two people were bitten. (CP 269-270). According to Officer Clint Davidson, had the dogs been declared potentially dangerous earlier, they would have been required to be kenneled or confined both inside and outside. (CP 159-160; 269). PCC 6.02.010(BB). The paperwork to declare the dog potentially dangerous would have only taken an animal control officer a half an hour to complete. (CP 270). `Officer Jody Page had also been out to the Johnson's residence about the **pit bulls** running loose in the neighborhood prior to Besaw's bite, but never infracted the Johnsons. (CP 275). Officer Page knew that the dog in question had bitten another adult just two weeks prior to Besaw and had substantial evidence to take action. (CP 276).

Prior being bitten on July 6, 2011, the plaintiff and his wife had made four previous complaints to Animal Control regarding the Johnson dogs being loose in the neighborhood, aggressive behavior and menacing their animals. (CP 242). Even after reporting the bite, Animal Control did not show up to inquire of the plaintiff for days after the reported bite and the **pit bulls** continued to terrorize the neighborhood. *Id.* On July 9, 2011, Besaw submitted an affidavit to Pierce County Animal Control stating that he went to the Johnson home to lend the owners his lawnmower and after knocking on the door he was attacked by the white

pit bull who was not contained, even though it had bitten someone previously, as reported to Animal Control. (CP 172).

Pierce County and Animal Control Officer Clint Davidson admits that Animal Control "has an extensive history with the dogs living at this address; as of this report there has been 7 other complaints of aggressive behavior dating back to August of 2008," (CP 163). On July 7, 2011, Besaw reported to Animal Control that the two Johnson **pit bulls** were loose; Besaw also reported the dogs loose on July 9, 2011. (CP 191-192).

On July 12, 2011, neighbor Robert Lee reported that the dogs in question were roaming loose in the neighborhood and acting aggressively towards him and a third neighbor. (CP 189). As of July 13, 2011, the dogs in question still were jumping their fence and roaming the neighborhood in an aggressive manner. (CP 169). On August 12, 2011, Animal Control posted a 48-hour abandonment notice on the Johnson household. (CP 187). Johnson, who was involved in gangs, had caused the house to be shot at by rival gangs in drive-by shootings so much that the neighbors posted a sign stating "They have moved, Stop shooting," as reported on August 2, 2011. (CP 187).

On August 28, 2011, the owner confirmed that he was not living with the dogs and that the dogs were still not licensed. (CP 185). On September 6, 2011, Animal Control responded to the Johnson house to

find that the dogs were at the home in the yard with the door wide open and no owner around. (CP 168). The owner was just given another verbal warning that the dogs should not be running loose. (CP 183). On September 9, 2011, Animal Control Office Clinton Davidson went to deliver the potentially dangerous animal paperwork to Johnson and found the dogs to be abandoned and left paperwork, which was not responded to as of a month after the notice. (CP 166). On September 10, 2011, it was reported that real estate agents were attempting to enter the abandoned house, but the dogs in question were apparently in the house unsupervised and uncontained. (CP 181). On September 11, 2011, Animal Control acknowledged that the house was virtually abandoned and that the dogs were still in the house. (CP 179).

After this long history of playing Plaintiff's neighborhood, as part of a "pack", the white **pit bull**, who eventually determined to be a potentially dangerous dog on September 13, 2011, the dogs were found at the Johnson residence abandoned. (CP 163) The dogs were finally declared potentially dangerous resulting from the bite to Brian Besaw on July 5, 2011, even though the dogs had previously bitten and threatened others. Besaw informed the police that he would have never gone to the Johnson residence had the dogs been outside or not secured inside. Id. These **pit bulls** were eventually declared potentially dangerous animals

well after the damage was done and after two other individuals were reported bitten on September 3, 2011, even though the dogs had bitten a human prior to Besaw's bite. Besaw's bite in July 2011. Had Pierce County designated the dogs in question potential dangerous after the first bite, the dogs would have been required to be " confined indoors" prior to Besaw's attack and unable to escape the house to bite him. (CP 159)

Vicious means chasing or approaching a person or animal in a menacing or apparent attitude of attack or the known propensity to do any act which might endanger the safety of any person, animal or property of another. (CP 218). It is a violation for Animals to leave the premises where the owner resides or to be "at large." (CP 227). It is a violation for a dog to jump on and/or threaten pedestrians, including snarling, growling, jumping on or threatening a person. Under Pierce County's own code, when two or more dogs are part of an attack and only one bites, all dogs are potentially dangerous (CP 354).

Once an animal is declared potentially dangerous the owner of the animal must ensure that the animal is properly restrained both indoors and outdoors and muzzled. (CP 27), Section 6.07.030. This case actually presents more substantial evidence than the reported cases directly on point, which are discussed below (i.e., *Gorman*, *Champagne*, *King*,). This

case should not have been summarily dismissed. Material question of facts abound.

V. ARGUMENT

The Appellate Court reviews grants of summary judgment *de novo*, and applies the same statutes as the Trial Court. See, *Donatelli v. D.R. Strong*, Wn. 2d 312, P3d 620 (2013).

> The party who moves for summary judgment has the burden of proving that there are no genuine issues of material fact, and all material evidence and reasonable inferences therefrom must be considered in the light most favorable to the non-moving party. *Balise v. Underwood*, 62 Wn.2d 195, 199, 381 P.2d 966 (1963); CR 56. Summary judgments should be granted only if the pleadings, affidavits, depositions, or admissions on file show there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. *Id.* Summary judgment is inappropriate where there is contradictory evidence and an issue of credibility is present. *Balise,* 62 Wn.2d at 200.

A. Pierce County Had A Statutory Duty Of Animal Control

The duty of Pierce County to control "potentially dangerous dogs" is established by RCW 16.08.090(2) which states "Potentially dangerous dogs shall be regulated only by local, municipal and county ordinances. Nothing in this section limits restrictions local jurisdictions may place on owners of potentially dangerous dogs."

The laws of defendant Pierce County deal with animals and animal control. Specifically, Title 6 of the Pierce County Code, which was in effect when Brian Besaw was attacked on July 6, 2011, deals with "Animals."

The intent of that Code was to control animals. PCC 6.02.020 states "Animal Control Agency" means that animal control organization authorized by Pierce County to enforce its animal control provisions. Marauding or aggressive dogs are addressed in Chapter 6.07 of the code. A "potentially dangerous animal" means any animal that (1) bites a human or animal; or chases or approaches a person in a menacing fashion or apparent attitude of attack. If two or more animals participate in an attack that results in a bite being inflicted upon a human or an animal, then such animals shall be deemed to be a potentially dangerous animal." (CP 216) (Section 6.02.010). Pierce County Animal Control has the ability to declare an animal as potentially dangerous if there is reasonable belief that the animal's conduct falls within the definition of a "potentially dangerous animal. (CP 227)(Section 6.07.010). The finding that an animal is "potential dangerous can be based on a written or verbal complaint of a citizen who is willing to testify that the animal acted in a manner which causes it to fall within the definition of Section 6.02.010; or animal bite reports filed with the County or actions of the animal witnessed by any

animal control office or law enforcement office or other substantial evidence. (CP 227)(Section 6.070.010).

The animal control agency then issues a "declaration of potentially dangerous" dog to the owner (PCC 6.07.010(B)) and this declaration states the "restrictions placed on the animal as a result of the declaration of potentially dangerous dog" (PCC 6.07.010(c)(6)).

Following a declaration of a potentially dangerous dog and the exhaustion of the appeal therefrom, the owner of a potentially dangerous dog shall obtain a permit for such dog from the animal control agency and shall be required to pay the fee for such permit In the amount of $250 to the Auditor or the Auditor's designee. In addition the owner of a potentially dangerous dog shall pay an annual renewal fee for such permit in the amount of $50 to the Auditor or the Auditor's designee.

Should the owner of a potentially dangerous dog fail to obtain a permit for such dog or to appeal the declaration of a potentially dangerous dog, the County or the County's designee is authorized to seize or impound such dog and after notification to the owner, hold the dog for a period of no more than five days before destruction of the dog.

PCC 6.07.020.

Following a declaration of a potentially dangerous dog and the exhaustion of the appeal therefrom, it shall be unlawful for the person

owning or harboring or having such potentially dangerous dog to allow and/or permit such dog to:

1. Be unconfined on the premises of such person; or

2. Go beyond the premises of such person unless such dog is securely leased and humanely muzzled or otherwise securely restrained.

B. Potentially Dangerous Dogs Must Be Tattooed Or Have A Microchip Implanted For Identification. (Emphasis Added).

Identification information must be on record with the Pierce County Auditor. PCC 6.07.030.

Any person who violates a provision of this Chapter shall, upon conviction thereof, be found guilty of a misdemeanor. Provided that any potentially dangerous dog which is in violation of the restrictions contained in Section 6.07.020 shall be seized and impounded. PCC 6.07.040.

The owner of a potentially dangerous dog must notify the animal control agency if the dog is loose or unconfined. (PCC 6.07.035.) Unconfined means not securely confined indoors or in a securely enclosed and locked pen or structure upon the premises of the person owning, harboring or having the care of the animal. (PCC 6.02.010). Violation of

restriction on a potentially dangerous dog means the potentially dangerous dog "shall be seized and impounded. (PCC 6.07.040).

In addition the Pierce County Code made it unlawful for animals to "be at large" or they could be seized and impounded. (PCC 6.03.020). It is unlawful for the person having control of a dog to allow it to frequently or habitually snarl at, growl at, jump upon or threaten persons upon the public sidewalks, roads, streets, alleys or public places, such a dog could be seized and impounded. (PCC 6.030.050). A current license was also required or the dog could be seized and impounded. (PCC 6.04.010).

If Pierce County had enforced its animal control ordinances in this case, both of the Johnson **pit bulls** would have been designated potentially dangerous dogs prior to Besaw's bite and certainly the white **pit bull** in question would have been deemed potentially dangerous with the June 24, 2011 dog bite prior to the Besaw bite based on the substantial evidence. The Johnsons were habitual violators and should have been deemed prohibited for owning dogs for 10 years.

Habitual Violator: Any owner receiving two or more convictions, singularly or in combination of crimes related to animals within a ten year period or any combination of two findings of potentially dangerous and/or dangerous animals within ten years or any four infractions, singularly or in combination, pursuant to chapter 6.03 found to be committed by the

district court within a five year period shall be guilty of a gross misdemeanor. Any person designated as a "habitual violator" shall be prohibited from owning animals for a period of not less than ten years. PCC 6.03.030(B).

In addition to its own Code, Pierce County can also enforce the laws of the State of Washington that deal with "dangerous dogs," which are defined in RCW 16.08.-7-(2) as:

> "Dangerous dog" means any dog that (a) inflicts severe injury on a human being without provocation on a public or private property, (b) kills a domestic animal without provocation while the dog is off the owner's property, or (c) has been previous found to be potentially dangerous because of injury inflicted on a human the owner having received notice of such and the dog again aggressively bites, attacks or endangers the safety of humans.

The owner of a dangerous dog is subject to the restrictions of RCW 16.08.080(6), which includes a proper enclosure to confine the dangerous dog, posting a warning sign that there is a dangerous dog on the property, display a warning symbol for children showing the presence of a dangerous dog, and post a surety bond or liability insurance of at least two hundred fifty thousand dollars.

The Defendant Pierce County had a duty to enforce the above statutes in this case. Its "Animal Control Officers" were expected to

control the animals pursuant to the laws of the State and the County. Here Pierce County had ample opportunity to do so before the plaintiff was injured by a known dangerous and vicious dog, and should be held accountable for its failures.

C. Pierce County's Failure to Enforce Its Animal Control Laws Falls Within the "Failure to Enforce" Exception to the Public Duty Doctrine.

The defendants below initially argued that in order for it to be liable the plaintiff was obligated to establish that one of the four exceptions to the "public duty doctrine" applied to the facts of the case. As indicated above apparently the Trial Court agreed.[3]

In the above-referenced *Gorman* opinion this court embraced the notion that the "failure to enforce" exception to the public duty doctrine applies when a municipal entity, such as Pierce County, fails to enforce its animal control laws. *Gorman* opinion at Page 77 provided under the heading "The Failure to Enforce Exception Applies" the following:

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[3] The Supreme Court in the recent *Robb v. City of Seattle*, 176 Wn.2d 427, 295 P.3d 212 (2013) opinion debunked the notion that in order for a governmental liability to be subject to liability under the laws of the State of Washington that the case had to fall within one or more of the four recognized exceptions to the "Public Duty Doctrine". In *Robb*, the Court found that governmental entity liability can be imposed if it violates recognized legal duties, such as, those set forth in the Restatement (Second) of Torts.

> "The parties dispute only whether the failure to enforce exception to the public duty doctrine applies in this case. We hold that it does. Under the failure to enforce exception, a governmental obligation to the general public becomes a legal duty owed to the plaintiff when (1) government agents who are responsible for enforcing statutory requirements actually know of a statutory violation, (2) the government agents have a statutory duty to take corrective actions but fail to do so, and (3) the plaintiff is within the class the statute is extended to protect. *Bailey v. Town of Forks*, 108 Wn.2d 262, 268, 737 P.2d 1257 (1987). The plaintiff has the burden of establishing each element of the failure to enforce exception, and the court must construe the exception narrowly. *Atherton Condo. Apartment/Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.,* 115 Wn.2d 506, 531, 799 P.2d 250 (1990).

In *Gorman,* the Appellate Court found that the Pierce County Animal Control ordinances which are also at issue in this case, implicated the failure to enforce exception to the Public Duty Doctrine because under the terms of provisions of such ordinances, Pierce County had an obligation to act. In reaching this conclusion this court relied heavily on the Division I opinion in the case of *Livingston v. City of Everett* 51 Wn.App. 655, 659, 751 P.2d 1199 (1988). Like this case, in *Livingston* the city's Animal Control Department had received numerous complaints about three dogs on the loose and behaving aggressively. Animal Control impounded the dogs for one day but released them back to the owner the following day. A few weeks later the dogs attacked a young boy. In *Livingston* the appellate court found there to be a question of fact as to

whether or not the city had violated its own ordinances because after impounding the dogs it did not evaluate the dogs for "dangerousness" prior to releasing them back to the owner the next day.

In *Livingston* the court only noted that there had been "numerous complaints" regarding the offending animal. In *Gorman,* the Appellate Court affirmed the notion that liability could be imposed against Pierce County for failing to enforce its animal control ordinances when the plaintiff's bite injury occurred following only three prior complaints that the offender dog had been acting aggressively towards humans and other pets.[4]

In this case given the litany of complaints, (at least 13), regarding the dogs running amok in plaintiff's neighborhood and based on the County's failure to effectively act in enforcing its own regulations, a reasonable jury could conclude that the County's actions violated the failure to enforce exception to the public duty doctrine. Telling, Pierce County's own documents and testimony from its own personal establishes

[4] Another case of note is *King v. Hutson* 97 Wn.App. 590, 987 P.2d 655 (1999). In *King* Division 3 found that the Stevens County Sheriff's Department (which apparently had animal control duties in Stevens County) could be liable under the failure to enforce exception for a dog attack which occurred after dozens of complaints had been made about the dogs residing on a neighbor's property. Here, like *King,* there had been a multitude of complaints regarding the pack of dogs (two or more) residing at the property where plaintiff ultimately suffered his bite.

that given prior violation, the neighbor's dogs, including one that bit plaintiff, should have been labeled "dangerous dogs", well in advance of plaintiff's injuries.

As such it was error for the trial court to dismiss plaintiff's claim on the basis of an absence of duty.

D. Pierce County Had A Common Law Duty Of Animal Control

Defendant Pierce County first argues that it has no duty to protect the public from dangerous animals and its only function is regulatory.

> At common law, individuals have a general duty to use reasonable care. When an act is negligent only if done without reasonable care, the care which the actor is required to exercise to avoid being negligent in the doing of the act is that which a reasonable man in his position with his information and competence would recognize as necessary to prevent the act from creating an unreasonable risk of harm to another.

Restatement (second) of Torts Sec. 298 (1965). There is also a duty to act when one's prior conduct is found to be dangerous:

> (1) If the actor does an act, and subsequently realizes or should realize that it has created an unreasonable risk of causing physical harm to another, he is under a duty to exercise reasonable care to prevent the risk from taking effect.
>
> (2) The rules stated in Subsection (1) applies even though at the time of the act the actor has no reason to believe that it will involve such a risk.

Restatement (second) of Torts Sec. 321 (1965).

In the present case, Mr. Besaw asserts that Pierce County owed him the common law duties described above. Pierce County had a duty to use reasonable care in responding to reports of aggressive behavior, the dogs being loose, roaming and previous bites by the dangerous **pit bulls** owned by the Johnsons. Restatement (Second) of Torts Sec. 298 (1965). With a history of many prior complaints of aggressive dogs running loose made to Pierce County through Animal Control and 911, the Pierce County Auditor knew or should have known that the dogs in question were frequently allowed to run loose through the neighborhood, and that they had a propensity to threaten humans and other dogs. Pierce County knew or should have known that the Johnson's exhibited an ongoing pattern of noncompliance with the animal control statutes and ordinances. Pierce County should have known that it needed to intervene to protect Mr. Besaw and his neighbors from being harmed by the put bulls. Pierce County should have realized that failing to control the Johnson's conduct with regard to their **pit bulls** created an unreasonable risk that the **pit bulls** would attack a human or another animal. See Restatement (Second) of Torts Sec. 321 (1965). A reasonable person could easily conclude that it was necessary for Pierce County to declare the **pit bulls** "potentially dangerous dogs" and either require their owners to confine them, or to

confiscate the **pit bulls** to prevent them from threatening people. Pierce County thus had a common law duty to take reasonable measures to prevent an attack from taking place.

In this case, the elements of the exception are met as follows: (1) Pierce County animal control agents had actual knowledge of **at least 13 instances** prior to the Besaw attack of the Johnson dogs marauding or aggressive behavior or bites, in violation of state and County ordinances. The last occurrence involved another bite. The documentation and evidence by the animal control officers confirm that there're were statutory violations that would have justified the dogs being labeled as potentially dangerous prior to the Besaw bite, which would have required the dogs should have been confined in a fully enclosed and locked kennel with warning signs, a special permit and even $250,000 of liability insurance. (3) A statutory duty to take corrective action existed after just one incident, let alone seven; state ordinances addressing "potentially dangerous dogs." (4) Plaintiff Brian Besaw and his neighbors were within the class of people expected to be protected by the statutes and ordinances.

Pierce County was charged with regulating potentially dangerous dogs. RCW 16.08.090. Under its own code provisions, Pierce County was required to classify potentially dangerous dogs. PCC 6.07.010. If the

owner of a potentially dangerous dog was out of compliance with the applicable animal control ordinances, Pierce County was required to seize and impound the potentially dangerous dog. PCC 6.07.040. If an owner had for or more infractions in a five year period or two findings of potentially dangerous or dangerous animals within a ten year period, Pierce County was to prohibit the owner from owning animals for not less than ten years. PCC 6.03.030. Clearly, Pierce County was responsible for enforcing its own code provisions relating to the control of potentially dangerous dogs.

This exception required knowledge of a violation and a failure to act. Here there were seven prior complaints against the Johnson dogs running loose, acting aggressively or biting a human. Both of the Johnson dogs were involved in some form in the attack on Besaw. Both dogs had a history of marauding the neighborhood, confronting citizens aggressively and the dog in question bit another person prior to Besaw. Given the inaction of the County it does not matter which dog ultimately gave the bite, either dog or both were part of the zone of danger the County was obligated to correct. The same is true with respect to the fact the attack occurred on a porch as opposed to out on the street. Again, such an attack was not so unforeseeable as to not be within the zone of danger the County's negligence contributed to.

The exception also requires that Mr. Besaw be within the class of individuals the ordinance was intended to protect.

A governmental officer's knowledge of an actual violation creates a duty of care to all persons and property who come within the ambit of the risk created by the officer's negligent conduct. *Livingston v. City of Everett, supra.* All of the complaints against the Johnsons are centered around the properties in and adjacent to the Johnson residence. Besaw was a reasonably foreseeable plaintiff because his close proximity to the Johnson property and the dogs prior aggression towards him and his neighbors. Mr. Besaw was in the ambit of risk created by Pierce County's failure to enforce its animal control ordinances. All of the elements of the failure to enforce exception are met, so Pierce County's motion should have been denied.

E. The Negligence By Pierce County Was A Proximate Cause Of Plaintiff's Injuries

"With respect to proximate cause, the negligence of two or more persons may combine to cause an injury." Although Mr. Mason was negligent in allowing his **pit bulls** to run loose it does not follow that the Society may not be liable for its later negligence, if any, in failing to apprehend the **pit bulls**. We reverse and remand." *Champagne*, 47 Wn. Ap.. at 896. In the present case, the fact that the Johnsons may be

negligent in allowing their **pit bulls** to run loose and attack people does not excuse Pierce County's negligence in failing to enforce its animal control ordinances, to impound and/or control the **pit bulls** based on the prior violations by the Johnsons. If Pierce County had done any of these things, Mr. Besaw would not have been attacked. The **pit bulls** would have either been confined in a proper enclosure or the dogs would have been removed. Pierce County's negligence was a proximate cause of Mr. Besaw's injuries. WPI 15.01. See also WPI 15.04 (concurrent negligence). WPI 15.04 provides in part:

> There may be more than one proximate cause of the same injury/event. If you find that the defendant was negligent and that such negligence was a proximate cause of injury or damages to the plaintiff, it is not a defense that the act of some other person may also have been a proximate cause. WPI 15.04.

The fact that the earlier notice applied to more than on dog at the address and owner in question is of no relevance. The dog that actually bit was part of the foreseeable zone of danger created by the County's failure to perform its job. See WPI 15.05 (Only unforeseeable negligence is an intervening superseding cause); See also *McLeod v. Grant County School District*, 42 Wn.2d 316, 255 P.2d 360 (1953) (Liability can be imposed if

harm fell within the "general field of danger which should have been anticipated.).

Likewise, there is legal causation based on Pierce County's multiple failures. Pierce County had a statutory duty to regulate potentially dangerous dogs. RCW 16.08.090, because Mr. Besaw was within the ambit of risk created by Pierce County's failure to enforce its animal control ordinances, the connection between Pierce County and Mr. Besaw's injuries and damages is not too remote to impose liability on Pierce County. The Appellate Court has already imposed liability on local governments for failing to enforce their animal control ordinances. See *Champagne*, *Livingston* and *King*. Here, what happened to plaintiff was within the general field of danger created and contributed to by defendant's negligence, and the fact that the exact manner in which such danger came to fruition was not exactly predictable is not important under the law, so long as the injury fell within the general field of danger that should have been anticipated. Id.

V. CONCLUSION

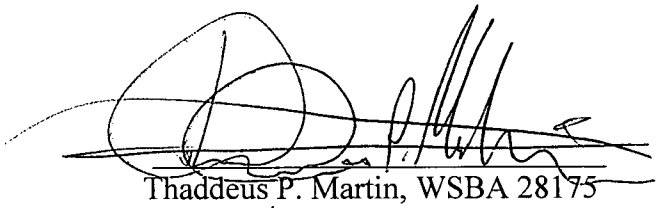
At a minimum in this case there are questions of fact as to or not Pierce County violated the "failure to enforce" exception to the Public Duty Doctrine when despite numerous complaints it failed to effective

remedial action against the aggressive dogs living in the neighborhood. One of these dogs, which was part of a "pack", inflicted upon him a serious dog bite injury. This was a unnecessary injury and would not have occurred "but for" Pierce County's failure to enforce its ordinance. As such, the Trial Court erred in finding there was not at least a question of fact as to whether or not Pierce County breached a duty.

Moreover, it was inappropriate for the Trial Court to make a determination that Pierce County's actions were not "proximate cause" of plaintiff's injuries. Proximate cause generally involves a question of fact. Further, simply because the method and manner in which an injury occurred was not 100 percent predictable does not mean that the events were too remote or unforceable. In this case, clearly what transpired (a dog dashing out of a front door when it should have been fully secured and rendered harmless) was within the "general field of danger" contributed to by defendant Pierce County's negligence. It respectfully requests that this matter be subject to reversal and remand back to the Trial Court either for trial or a mandatory arbitration.

DATED this 29th day of December, 2013.

LAW OFFICE OF THADDEUS P. MARTIN



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I AM NOT A PARTY TO THIS ACTION AND THAT I PLACED FOR SERVICE ON COUNSEL OF RECORD THE FOREGOING DOCUMENT VIA EMAIL FOLLOWED BY LEGAL MESSENGER, ON THE 30 DAY OF December, 2013.

PERSONS SERVED:

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SIGNED Kara Denny
KARA DENNY, LEGAL ASSISTANT